



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



Public Copy

FILE: [REDACTED]

Office: Miami

Date:

OCT 18 2000

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Permanent Residence Pursuant to Section 1 of the Cuban Adjustment Act of November 2, 1966 (P.L. 89-732)

IN BEHALF OF APPLICANT: Self-represented

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly

Terrance M. O'Reilly, Director
Administrative Appeals Office

OCT 18 2000 - 01122600

DISCUSSION: The application was denied by the District Director, Miami, Florida, who certified his decision to the Associate Commissioner, Examinations, for review. The district director's decision will be affirmed.

The applicant is a native and citizen of Cuba who filed this application for adjustment of status to that of a lawful permanent resident under section 1 of the Cuban Adjustment Act of November 2, 1966. This Act provides for the adjustment of status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959, and has been physically present in the United States for at least one year, to that of an alien lawfully admitted for permanent residence if the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence.

The district director determined that the applicant was not eligible for adjustment of status because he not was inspected and admitted or paroled into the United States. The district director, therefore, denied the application.

The applicant has provided no statement or additional evidence on notice of certification.

The application for adjustment of status, filed on June 22, 1997, shows that the applicant claimed to have entered the United States at Key West, Florida, in May 1980, and that he was inspected by an officer of the Service. The record of proceeding contains a Form I-94 reflecting that on June 1, 1980, the applicant was paroled into the United States pursuant to section 212(d)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(d)(5). Upon filing of an application for asylum, another Form I-94 was issued on December 16, 1980. On November 27, 1989, another Form I-94 was issued by the Service with a notation, "CUBAN HAITIAN ENTRANT Status Pending."

The Service record, however, reflects that on October 4, 1986, the Service was contacted by the National City Police Department to report that they have 15 aliens in their custody. The applicant admitted to a Service officer during interview that he was a political refugee; that he had entered the United States in 1980; that he subsequently went to Mexico for a visit and was denied entry into the United States by immigration officials; that on October 3, 1986, he entered the United States one mile east of the San Ysidro, California port of entry; that he had been detained by the Border Patrol in 1984 and subsequently released, but did not remember why he was detained. The Federal Bureau of Investigation (FBI) report, contained in the record of proceeding, further reflects that on October 20, 1985, the applicant was arrested and charged with False Claim to United States Citizenship, and that he was released on October 22, 1985.

The effect of departure from the United States for an applicant under section 1 of the Act of November 2, 1966, is provided in 8 C.F.R. 245.2(a)(4) as follows:

(iii) If an applicant who was admitted or paroled subsequent to January 1, 1959, later departs from the United States temporarily with no intention of abandoning his or her residence, and is readmitted or paroled upon return, the temporary absence shall be disregarded for purposes of the applicant's "last arrival" into the United States in regard to cases filed under section 1 of the Act of November 2, 1966.

In Matter of Martinez-Monteagudo, 12 I&N Dec. 688 (Reg. Comm. 1968), the Regional Commissioner held that a native and citizen of Cuba who last entered the United States illegally, having entered without inspection, is ineligible for adjustment of status under section 1 of the Act of November 2, 1966, notwithstanding he had on prior occasions subsequent to January 1, 1959 been inspected and admitted into the United States.

The FBI report reflects that on October 20, 1985, the applicant was arrested at the San Ysidro port of entry after claiming to be a United States citizen when applying for reentry into the United States. He was released from custody on October 22, 1985. There is no evidence that the applicant was convicted of this charge, nor is there evidence that he was subsequently admitted or paroled into the United States prior to his release. On October 4, 1986, the applicant and 14 other aliens were apprehended by the National City Police Department subsequent to his entry into the United States, one mile east of the San Ysidro, California port of entry on October 3, 1986.

The applicant furnished a copy of a replacement Form I-94 issued by the Service on November 27, 1989, indicating that the applicant is a "Cuban Haitian Entrant - Status Pending." Evidence in the record, however, reflects that the applicant last entered the United States without inspection on October 3, 1986. Because the applicant is in the United States pursuant to an illegal entry, the replacement Form I-94 was, therefore, erroneously issued. In Sussex Engineering, Ltd. v. Montgomery, 825 F.2d 1084 (6th cir. 1987), the Court of Appeals held that it is absurd to suggest that the Service must treat acknowledged errors as binding precedent. The Service is not required to approve applications or petitions where eligibility has not been demonstrated. See Matter of M-, 4 I&N Dec. 532 (A.G. 1952; BIA 1952). In this case, the applicant has not demonstrated that he is eligible for permanent residence pursuant to section 1 of the Cuban Adjustment Act.

The record reflects that the applicant did not arrive at a designated port of entry as provided in section 275 of the Act, 8 U.S.C. 1325, but rather, he entered one mile east of the San Ysidro port of entry. It was held in Matter of O-, 1 I&N Dec. 617 (BIA

1943), that when an alien enters the United States within the limits of a city designated as a port of entry, but at a point where immigration officers are not located, the applicable charge is entry without inspection. See also Matter of Estrada-Betancourt, 12 I&N Dec. 191 (BIA 1967); Matter of Pierre, 14 I&N Dec. 467 (BIA 1973).

The applicant bears the burden of proving that he in fact presented himself for inspection as an element of establishing eligibility for adjustment of status. Matter of Arequillin, 17 I&N Dec. 308 (BIA 1980). The applicant has failed to meet that burden.

It is, therefore, concluded that the applicant has failed to establish that he was inspected and admitted or paroled into the United States. There is no waiver available to an alien found statutorily ineligible for adjustment of status on the basis that he was not inspected and admitted or paroled into the United States. The applicant is not eligible for the benefit sought. The decision of the district director to deny the application will be affirmed.

ORDER: The district director's decision is affirmed.